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SUBJECT: NEW INDONESIAN NCB ASSET FORFEITURE BILL DRAFTED

11. (SBU) SUMMARY: On November 5 and 6, 2009, a multi-agency Indonesian drafting team, working with DOJ's OPDAT, put the finishing touches on a non-conviction based (NCB) asset forfeiture law. The draft bill addresses a series of issues ranging from the appropriate burden of proof, to the need to protect claimants and innocent third parties, to the preservation, management and use of seized assets. While the legislation requires further work, the head of PPATK, Indonesia's FIU, stated that the legislation will be completed in time to be placed upon the 2009-2010 parliamentary agenda. If passed by parliament, this statute could provide Indonesia with an effective remedy to pursue stolen assets in those situations where criminal charges are not possible. The draft legislation that emerged from the workshop was another tangible benefit of INL justice assistance in Indonesia. End Summary.

NON-CONVICTION BASED ASSET FORFEITURE

12. (U) Indonesia possesses statutory authority to forfeit assets in certain criminal cases, but lacks a comprehensive, non-conviction based (NCB) asset forfeiture statute. Such a statute is a powerful tool which permits the recovery of stolen assets and assets used to facilitate criminal activities where it is impossible or impractical to bring criminal charges against the perpetrator. These situations arise, for example, where a criminal defendant flees or dies before trial, where a crime has been committed but there are problems with evidence or proof at trial, or where immunity from prosecution or a lack of political will precludes criminal prosecution. NCB asset forfeiture has proven to be such a useful tool to recover assets stolen through corruption that the United Nations Convention against Corruption (UNCAC) urges countries to implement NCB asset forfeiture legislation.

13. (U) Over the course of the past year, an inter-agency drafting team consisting of representatives of Indonesia's FIU (the PPATK), the Attorney General's Office, the Ministry of Law and Human Rights, the Ministry of Finance, and the Corruption Eradication Commission (the KPK) met and worked upon a non-conviction based asset forfeiture law, and members of the drafting team visited the United States to meet with DOJ experts. In August 2009, the drafting team produced an initial draft of the NCB law. PPATK head, Pak Yunus Husein, requested that the Department of Justice review the draft law and specifically inquired whether Linda Samuel could come to Jakarta to lead a final drafting session before the legislation was submitted to parliament.

14. (U) AFMLS Deputy Chief Linda Samuel has significant domestic and international forfeiture experience. She is coauthor of "Stolen Asset Recovery, A Good Practice Guide for Non-Conviction Based Asset Forfeiture", the bible for nations implementing a NCB law. She has also worked closely with the United Nations and World Bank on the Stolen Asset Recovery (StAR) initiative which works to develop the capacity of nations to use asset forfeiture to recover stolen assets. She has worked with the Government of Indonesia in the past on both money laundering and asset forfeiture issues

HUMAN RIGHTS CONCERNS

15. (U) On November 5 and 6, 2009, the drafting team worked through 85 paragraphs of draft legislation, sentence by sentence. Embassy RLA, FBI and US Treasury participated in the drafting session. While no member of the drafting team was opposed to the legislation per se, several expressed qualms about the legality of seizing assets from an individual who was not convicted of a crime, even if the forfeited assets were patently the proceeds of crime. One interlocutor asserted that civil forfeiture constituted double jeopardy, and another worried that a substitute assets provision (which permits the seizure of a perpetrator's legitimate assets to substitute for dissipated or concealed criminal assets) was unfair.

16. (U) Samuel and Embassy RLA addressed each of these points to the apparent satisfaction of the drafting team, noting initially that no one possesses rights to illegally acquired property, even in the absence of a criminal conviction. The inability of the government to prosecute a defendant for reasons beyond its control does not mean that the defendant should keep stolen assets. The lack of a

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criminal conviction does not impose legitimacy upon otherwise illegally acquired property.

17. (U) Samuel noted that double jeopardy concerns do not apply to NCB asset forfeiture. Double jeopardy prohibits an individual from being twice prosecuted for the same offense. NCB forfeiture actions are brought against the stolen property, not against the person. Indeed, the reason why a NCB asset forfeiture case is being pursued is because the person has escaped prosecution. A substitute asset forfeiture provision simply substitutes legitimately acquired assets for stolen assets which the defendant has dissipated or deliberately placed beyond the reach of law enforcement. The absence of such a provision creates a loophole that would destroy the utility of NCB asset forfeiture by permitting a perpetrator to use or conceal stolen assets while keeping legitimate assets. Embassy RLA pointed out that a number of European Courts, the European Court of Human Rights, and Courts in the United States and Canada have all upheld NCB legislation against these and other human rights challenges.

18. (U) Both Samuel and RLA recognized, nonetheless, that there are significant human rights considerations engendered by NCB asset forfeiture. It is critical that claimants of seized property are afforded a meaningful and timely opportunity to challenge the seizure and forfeiture of property, and the rights of innocent owners and third parties needed to be respected. Both Samuel and RLA criticized the draft statute because it fails to clearly articulate a list of possible defenses to NCB forfeiture and stressed the vital importance of ensuring that claimants have a mechanism to easily challenge a seizure.

SEIZED ASSET MANAGEMENT

19. (U) A transparent, fair and effective system to handle the seizure, maintenance and disposal of seized property is critical to maintain public acceptance and support of NCB asset forfeiture. To assist the drafting team on how to address asset management, Samuel recommended a Best Practices Asset Management Guide prepared under the auspices of the G-8, which addressed many of the issues under consideration by the drafting team. She also advised that the United States had funded asset forfeiture asset management software which could be used by Indonesia. The RLA advised that OPDAT is prepared to supply further technical assistance on these issues to the Ministry of Finance.

ROAD AHEAD

¶10. (SBU) The conference was useful but a number of issues still remain to be addressed and resolved by the drafting team before the legislation can be sent to parliament. Of particular concern is whether the drafting team will remove or reduce the minimum statutory amount for asset forfeiture, and what burden of proof will govern cases brought under the new statute. It will be especially critical to ensure that neutral and transparent procedures are in place before assets are seized and forfeited lest the NCB statute be viewed as a tool of a corrupt government.

HUME